

**Why Colorado is Rothgery Compliant.**

- In Colorado, if imprisonment is a possibility, EVERY indigent criminal defendant is advised of and entitled to the appointment of counsel beginning at the time of the initial appearance.
- By statute in Colorado, the court MUST advise EVERY (not just indigent) defendant of the right to counsel “at the first appearance of the defendant in court or upon arraignment, whichever is first in time.” C.R.S. 16-7-207(1). (This is entirely consistent with the holding in Rothgery.)
- Further, pursuant to that same statute, the court must “inform the defendant and make certain that he understands” his right to representation and right to appointed counsel (upon application and approval) if he is indigent.
- PLEA BARGAINING: The District Attorney may engage in plea negotiations if it serves the effective administration of justice. By law, if the DA does this, he should engage in such negotiations and agreements only through the presence of defense counsel EXCEPT where the defendant is not eligible for appointment of counsel OR refuses appointment of counsel AND has not retained counsel....EXCEPT as provided in C.R.S. 16-7-301(4).
- Pursuant to C.R.S. 16-7-301(4), in cases involving misdemeanors, traffic cases or petty offenses, the prosecutor is OBLIGATED to tell the defendant any offer (plea offer) that can be based upon the facts as known by the prosecutor at this time. (C.R.S. 16-7-301(4)).

**Statutory Requirements of C.R.S. 16-7-301(4):**

- FIRST – the defendant is under NO obligation to talk with the prosecutor.
- SECOND – The prosecutor SHALL advise the defendant that he has the right to retain counsel or seek appointment of counsel.
- THIRD – Upon completion of the discussions, if they occur, the prosecutor SHALL inform the court of whether a plea agreement has been reached; AND THEN
- FINALLY – If a plea agreement has been reached, and the court DETERMINES that the proposed agreement is acceptable, the court SHALL in addition to any other advisement required by law, ADVISE the defendant of the right to a court appointed attorney (again) PRIOR to acceptance of the defendant’s plea.

### **The Perceived Problem:**

- The language in CRS 16-7-301(4)(a) establishing the process for the reaching plea agreements in misdemeanors, traffic offenses and petty offense includes a poorly worded, and arguably unnecessary provision that says:

“The application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant as provided in this subsection (4).”
- Some argue that this somehow trumps the defendant’s right to ask for counsel and mandates a plea negotiation before being permitted to apply for appointed counsel. While CDAC disagrees with this interpretation, CDAC agrees the right to seek counsel needs to be exceedingly clear and not clouded or misinterpreted by poor drafting.

### **The Simple Fix:**

- First - Delete the problematic sentence pointed out above.
- Second – Insert, at the beginning of this subsection (4)(a) another advisement by the court making it clear to the defendant that there is no requirement to talk with the DA and that the defendant can invoke the right to counsel at that moment.
- Third – Before accepting the plea (if arrived at pursuant to this process) and as part of the final advisement expressly warn the defendant of the potential of the many collateral consequences related of any plea of guilty.